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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1632

STEVEN WISE WRIGHT and
CLARENCE EDWARD WRIGHT, JR.,
Petitioners,

v.

VIRGINIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-entitled case on March 8, 1973.

Opinions Below

The oral opinion of the trial court denying petitioners' motion to dismiss the warrants is unreported and is set out in the Appendix, pp. 1a-6a. The order of the Supreme Court of Virginia denying a petition for writ of error is unreported and is set out in the Appendix, p. 7a. The order of the Supreme Court of Virginia, dated March 8, 1973, denying a petition for rehearing is unreported and is set out in the Appendix, p. 8a.

Jurisdiction

The judgment of the Supreme Court of Virginia denying a petition for rehearing on its denial of the petition for writ of error was entered on March 8, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

1) Is the Virginia disorderly conduct statute on its face and as applied in this case unconstitutionally overbroad and vague, in violation of the Fourteenth Amendment?

2) Was petitioner Steven Wright denied his rights under the First and Fourteenth Amendments of the Constitution in that he was convicted of the crime of disorderly conduct on evidence showing that at most he argued with a policeman and refused to be quiet when that policeman was questioning another person as to the reason for a disturbance?

3) Was the petitioner Steven Wright denied his right to due process under the Fourteenth Amendment to the Constitution in that there is no evidence presented that would support a conviction for disorderly conduct under the laws of Virginia?

4) If the initial arrest of petitioner Steven Wright for disorderly conduct was illegal, was it a denial of due process to convict petitioners Steven Wright for resisting arrest and Clarence Wright for assault and battery and resisting arrest for actions that occurred solely because of that illegal arrest?

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments of the Constitution of the United States, which provide in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for a redress of grievances:
>
> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

This case also involves the following provisions of the Code of Virginia:

> § 18.1-253.2. *Disorderly conduct in other public places; power of counties, cities and towns to adopt ordinances and resolutions.*—If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place, other than those mentioned in the preceding section (§ 18.1-253.1), or causes any unnecessary disturbance in or on any public conveyance, by running through it, climbing through windows or upon the seats, failing to move to another seat when lawfully requested to so move by the operator, or otherwise annoying passengers or employees therein, he shall be guilty of a misdemeanor.
>
> Cities, towns and counties are hereby authorized and empowered to adopt ordinances or resolutions prohibiting and punishing the above acts, or any of them, when committed in such cities, towns, or counties, and such ordinances or resolutions shall provide the same punishment for a violation thereof as is provided by this section, anything in the charters of such cities or towns to the contrary notwithstanding. All fines imposed for the violation of such ordinances or resolutions shall be

paid to and retained by such cities, towns and counties, and the Commonwealth shall not be chargeable with any costs in connection with any prosecution for the violation of any such ordinances or resolutions. (Code 1950, § 18-131; Code 1950 (Repl. Vol. 1960), § 18.1-254; 1950, p. 36; 1960, c. 358; 1969, Ex. Sess., c. 2.)

§ 18.1-310. *Obstructing justice by threats or force.*— If any person, by threats, or force, attempt to intimidate or impede a judge, justice, juror, witness, or an officer of a court, or any sergeant or other peace officer, or any revenue officer, in the discharge of his duty, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a misdemeanor. (Code 1950, § 18-272; 1960, c. 358.)

Statement

Petitioners Steven Wise Wright and Clarence Edward Wright, Jr., were charged with a number of violations of Virginia statutes and ordinances of the County of Albemarle, all arising out of an incident occurring on November 19, 1970. They were initially charged by warrants and tried in county court and convicted of several offenses by that court sitting without a jury. Pursuant to Virginia law, they noted appeals to the Circuit Court of the County of Albermarle and were given a trial *de novo* as to all pending charges on June 21, 1972.[1] By agreement of the defendants, the trial was to the court sitting without a jury.

Steven Wright was charged under warrants for disorderly conduct and resisting arrest in violation of

[1] Under Virginia law, which is similarly to that in a number of other states, see *Colten* v. *Kentucky*, 407 U.S. 104 (1972), the effect of the appeal and trial *de novo* was to eliminate any record of the prior conviction. Thus, the entire record in this case is based on the one made at the trial *de novo* in the Circuit Court.

§§ 18.1-253 and 18.1-310 of the Code of Virginia.[2] Clarence Wright was also charged with disorderly conduct and with common law assault and battery on a police officer and resisting arrest.

Steven Wright was convicted and sentenced on the charge of disorderly conduct and ordered to pay a fine of $50.00 and costs. He was convicted of the charge of resisting arrest and was sentenced to confinement in jail for 30 days; the sentence was suspended and he was put on probation for a period of 12 months and ordered to pay a fine of $50.00 and costs. Clarence Wright was convicted of both resisting arrest and assault and battery on a police officer and was sentenced to serve 30 days in jail and to pay a fine of $50.00 and costs on both counts.[3]

The execution of all judgments was suspended to allow a petition for writ of error to be filed in the Supreme Court of Virginia.[4] The petition for writ of error was denied by the Supreme Court of Virginia on February 2, 1973, as was a petition for rehearing on March 8, 1973, occasioning this petition for writ of certiorari.

Statement of Facts

The incident that gave rise to the charges against both petitioners arose out of an altercation between the two and the management of a nightclub located in Albermarle

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[2] Two other charges for assault involving another person were dismissed at the end of the state's case on the basis that no evidence whatsoever had been introduced in their support.

[3] The disorderly conduct charge against Clarence Wright was dismissed on the ground that it was incorporated into the charge of assault and battery.

[4] By agreement, the execution of the sentences has been further postponed pending the disposition of this petition for writ of certiorari.

County, Virginia. The altercation began inside the club and continued after the two petitioners and their companions had been ejected from it (Tr. 57-60).[5] At this point members of the sheriff's department of Albemarle County arrived on the scene and observed a group of persons variously estimated as between 15 and 30 standing in front of the club (Tr. 2-3, 12).

One of the officers, deputy sheriff Guthrie, left his car and approached the scene. He saw the manager of the club, Mr. Kessler, engaged in an argument with petitioner Steven Wright (Tr. 3). The officer began talking to Mr. Kessler, asking him what had occurred. As Kessler was attempting to give his side of the story, Steven Wright interrupted, stating that that was not what had happened (Tr. 3). Sheriff Guthrie testified that he accompanied his remarks with arm-waiving and that he spoke loudly (Tr. 3-4).[6] The officer warned him not to interrupt again or he would be arrested for disorderly conduct (Tr. 3, 5).

Petitioner Steven Wright again interrupted and was warned again. On the third interruption Sheriff Guthrie told him that he was under arrest for disorderly conduct and caught him by the arm (Tr. 3-4). Petitioner Wright pulled his arm away and jerked it back, although he did not put his hand into a fist (Tr. 5, 13). The officer struck him on the side of his head with a small billyclub (Tr. 5). At that point Clarence Wright, Steven Wright's brother, jumped on the officer's back (Tr. 6). Two other officers helped subdue Clarence Wright and in the process struck

[5] Citations are to the Transcript of Testimony filed in the Supreme Court of Virginia.

[6] The officer also testified that petitioner had "cursed." When he was unable to remember the words used, the court struck that testimony and did not consider it in finding Steven Wright guilty (Tr. 7).

him on the back of the head with a nightstick (Tr. 18, 22).[7]

How the Federal Questions Were Raised and Decided Below

At the close of state's evidence counsel for petitioners moved to strike the evidence as to the warrants and to dismiss the charges. It was contended that the evidence failed to show any violation of the disorderly conduct statute and that, moreover:

> . . . [I]f the statute is so construed as to embrace any other conduct that occurred prior to a physical touching between either of the officers and either of the defendants, that then the statute would be violative of the First and Fourteenth Amendments of the Constitution of the United States. (Tr. 25).

In argument, it was pointed out that the only basis shown for the initial arrest of disorderly conduct was speech that was protected by the First Amendment. Therefore, if the statute under which the disorderly conduct charge was brought was construed to cover such speech, then the statute would be void as being vague

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[7] The facts as stated above are presented in the light most favorable to the state. Petitioners gave an entirely different story. They and their companions testified that it was Clarence Wright who attempted to give his side of the dispute. Steven Wright was in a dazed state because he had been struck over the head earlier inside the nightclub. Sheriff Guthrie responded by saying to Clarence to be quiet "boy." When Clarence Wright protested the epithet, he was then told to be quiet or he would be arrested. Steven Wright then stated that he was going to tuck his shirt in, at which point the deputy sheriff struck him on the side of his head with a billy-club. Clarence Wright denied that he assaulted the officer but rather testified that he was standing with his back towards the deputies attempting to hold his brother up when he was struck on the back of the head himself and placed under arrest.

and overbroad, in violation of the First and Fourteenth Amendments (Tr. 28-29). It was further pointed out that the language of the ordinance itself was vague and therefore unconstitutional on its face, in violation of the Fourteenth Amendment (Tr. 28-29). In argument, counsel for petitioners cited decisions of this Court, including, *inter alia, Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), and *Gooding* v. *Wilson*, 405 U.S. 518 (1972). It was further argued that because the other charges stemmed solely from the initial illegal arrest of petitioner Steven Wright, they also were in violation of the Fourteenth Amendment to the Constitution of the United States (Tr. 30). These arguments were rejected by the trial court (Tr. 34-39; A. pp. 1a-6a).

These same points were raised in the Assignments of Error filed with the Notices of Appeal to the Supreme Court of the State of Virginia in the following language:

> (Steven Wright—No. 2419,[8] disorderly conduct)
>
> 1. The judgment is contrary to the law and evidence; there having been no showing of a violation of Section 18.1-253.2 of the Code of Virginia or of any other law.
>
> 2. In ruling that the statute proscribed the speech or related conduct of the defendant with the definiteness and specificity required in the area of First Amendment freedoms, the court deprives persons, including the defendant, of liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> 3. In ruling that the speech or related conduct of the defendant, as shown by the evidence, was fairly

[8] Citations are to the indictment numbers referred to in the order of the Supreme Court of Virginia under which the notices of appeal were filed (App. p. 7a).

proscribed by statute, the court has deprived the defendant of liberty and property without due process of law, in violation of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and in violation of the Fourteenth Amendment to the Constitution of the United States.

4. In ruling that without warrant of statute an officer may require a person to refrain from speaking under penalty of arrest and prosecution for disorderly conduct, the court has denied rights of free speech and rights of petition secured by Section 12 of Article I (Bill of Rights) of the Constitution of Virginia and by the First and Fourteenth Amendments to the Constitution of the United States and, moreover, the court has thereby permitted peace officers to assume legislative and judicial prerogatives, in violation of the doctrine of separation of powers expressed in Section 4 of the Article I (Bill of Rights) of the Constitution of Virginia and in violation of the due process requirements of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and the Fourteenth Amendment to the Constitution of the United States.

(Steven Wright—No. 2414, resisting arrest)

1. The judgment is contrary to the law and the evidence; there having been no showing that the defendant by threats or force attempted to intimidate or impede any officer in the discharge of his duty or that the defendant otherwise violated Section 18.1-310 of the Code of Virginia or any other law.

2. The court erred in rejecting the defense that the pretended arrest for disorderly conduct was unlawful; no violation of Section 18.1-253.2 of the Code of Vir-

ginia or of any other law having been committed in the presence of the sheriff's deputy and no warrant for such arrest having been issued.

3. The court erred in rejecting the defense that the pretended arrest was attempted solely because the defendant made and persisted in making denials, counter accusations and other utterances, none of which were proscribed by any statute with the definiteness and specificity required by the First and Fourteenth Amendments to the Constitution of the United States.

4. The court erred in rejecting the defense that the sheriff's deputy had unlawfully sought to arrest the defendant solely because he made and persisted in making denials and counter accusations and other utterances and otherwise annoyed the sheriff's deputy, none of which utterances or annoyances was fairly proscribed by statute conformably with the due process provisions of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. The court erred in rejecting the defense that the pretended arrest was an unwarranted attack upon the defendant made solely because he failed to heed the sheriff's deputy's requirement that he refrain from speaking, under penalty of arrest and prosecution: whereby the court denied the right of free speech and the right of petition secured by Section 12 of Article I (Bill of Rights) of the Constitution of Virginia and by the First and Fourteenth Amendments to the Constitution of the United States and, moreover, the court has thereby permitted peace officers to assume legislative and judicial prerogatives in violation of the doctrine

of separation of powers expressed in Section 4 of Article I (Bill of Rights) of the Constitution of Virginia and in violation of the due process requirements of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and of the Fourteenth Amendment to the Constitution of the United States.

(Clarence Wright—No. 2415 resisting arrest)

1. The court erred in rejecting the defense that the encounter with the sheriff's deputies for which they sought to arrest the defendant commenced with and grew out of his justifiable act to repel an unwarranted attack upon the defendant's brother whom the sheriff's deputy unlawfully sought to arrest on a pretended charge of disorderly conduct, there having been no violation of Section 18.1-253.2 of the Code of Virginia or of any other law.

2. The court erred in rejecting the defense that the encounter with the sheriff's deputies for which they sought to arrest the defendant commenced with and grew out of his justifiable act to repel an unwarranted attack on the defendant's brother whom the sheriff's deputy had unlawfully sought to arrest solely because he made and persisted in making denials, counter accusations and other utterances, none of which were proscribed by any statute with the definiteness and specificity required by the First and Fourteenth Amendments to the Constitution of the United States.

3. The court erred in rejecting the defense that the encounter with the sheriff's deputies for which they sought to arrest the defendant commenced with and grew out of his justifiable act to repel an unwarranted attack upon the defendant's brother whom the sheriff's deputy had unlawfully sought to arrest solely because he made and persisted in making denials and counter

accusations and other utterances and otherwise annoyed the sheriff's deputy, none of which utterances or annoyances was fairly proscribed by statute conformably with the due process provisions of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. The court erred in rejecting the defense that the encounter with the sheriff's deputies for which they sought to arrest the defendant commenced with and grew out of his justifiable act to repel an unwarranted attack upon the defendant's brother whom the sheriff's deputy had unlawfully sought to arrest solely because he failed to heed said deputy's requirement that he refrain from speaking, under penalty of arrest and prosecution; whereby the court denied the right of free speech and the right of petition secured by Section 12 of Article I (Bill of Rights) of the Constitution of Virginia and by the First and Fourteenth Amendments to the Constitution of the United States and, moreover, the court has thereby permitted peace officers to assume legislative and judicial prerogatives in violation of the doctrine of separation of powers expressed in Section 4 of Article I (Bill of Rights) of the Constitution of Virginia and in violation of the due process requirements of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and of the Fourteenth Amendment to the Constitution of the United States.

(Clarence Wright—No. 2417 assault and battery)

1. The court erred in rejecting the defense that the alleged assault and battery was a justifiable act to repel an unwarranted attack upon the defendant's brother whom the sheriff's deputy unlawfully sought to arrest

on a pretended charge of disorderly conduct, there having been no violation of Section 18.1-253.2 of the Code of Virginia or of any other law.

2. The court erred in rejecting the defense that the alleged assault and battery was a justifiable act to repel an unwarranted attack on the defendant's brother whom the sheriff's deputy had unlawfully sought to arrest solely because he made and persisted in making denials, counter accusations and other utterances, none of which were proscribed by any statute with the definiteness and specificity required by the First and Fourteenth Amendments to the Constitution of the United States.

3. The court erred in rejecting the defense that the alleged assault and battery was a justifiable act to repel an unwarranted attack upon the defendant's brother whom the sheriff's deputy had unlawfully sought to arrest solely because he made and persisted in making denials and counter accusations and other utterances and otherwise annoyed the sheriff's deputy, none of which utterances or annoyances was fairly proscribed by statute conformably with the due process provisions of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. The court erred in rejecting the defense that the alleged assault and battery was a justifiable act to repel an unwarranted attack upon the defendant's brother whom the sheriff's deputy had unlawfully sought to arrest solely because he failed to heed said deputy's requirement that he refrain from speaking, under penalty of arrest and prosecution; whereby the court denied the right of free speech and the right of

> petition secured by Section 12 of Article I (Bill of Rights) of the Constitution of Virginia and by the First and Fourteenth Amendments to the Constitution of the United States and, moreover, the court has thereby permitted peace officers to assume legislative and judicial prerogatives in violation of the doctrine of separation of powers expressed in Section 4 of Article I (Bill of Rights) of the Constitution of Virginia and in violation of the due process requirements of Sections 8 and 11 of Article I (Bill of Rights) of the Constitution of Virginia and of the Fourteenth Amendment to the Constitution of the United States.

All issues so raised by the Assignments of Error were briefed at length in the petition for writ of error. In denying the petition, the Supreme Court of Virginia stated:

> The petition . . . having been maturely considered and transcripts . . . seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas in each of these cases, the effect of which is to affirm the judgments of the said circuit court. (A. p. 7a.)

The same contentions were made in the petition for rehearing, and by its denial of the petition the Supreme Court of Virginia necessarily again passed on and denied those same claims.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Decisions of This Court Holding That Penal Statutes That are Vague and Overbroad Cannot Support a Criminal Conviction and That a Conviction Based on No Evidence of the Crime Charged Violates Due Process.

1. A long line of decisions by this Court have held that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally* v. *General Construction Company*, 269 U.S. 385, 391 (1926).

See also *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966); *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

Many of these decisions dealt with statutes or common law crimes similar to the Virginia disorderly conduct statute involved here. Thus, in *Ashton* v. *Kentucky*, *supra*, this Court struck down a conviction for common law libel which made illegal a writing calculated "to create disturbances of the peace." In *Cantwell* v. *Connecticut*, *supra*, the common law crime of "inciting of a breach of the peace" was similarly held unconstitutionally vague, and in *Gooding* v. *Wilson*, *supra*, a Georgia statute which prohibited the use of "opprobrious words or abusive language, tending to cause a breach of the peace" was also held vague and indefinite.

Petitioners urge that the present case falls squarely within the rule of law established by the above decisions.

Just as in *Lanzetta* v. *New Jersey*, *supra*, "the terms [the statute] employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." 306 U.S. at 458.

Here, the evidence established only that Steven Wright had attempted to tell a sheriff's deputy his version of a dispute that was being investigated. In doing so, he did raise his voice and apparently gestured with his hands. The trial court held that such acts constituted "disorderly conduct" even though the term was in no way defined by the statute to include such actions.[9] Thus, the issue in this case is not whether the State of Virginia could proscribe the acts of the defendant by means of a specific statute outlawing the refusal to obey a police officer's order to be quiet while he was investigating a disturbance. Of course, the fact that a narrowly drawn statute might be valid as applied to petitioner's acts does not prevent his raising the defense that the statute is vague or overbroad. *Gooding* v. *Wilson*, *supra*.[10]

Further, this is not a case in which, prior to petitioner's prosecution, the state courts had given a narrow construc-

[9] Therefore, this case is in sharp contrast with *Colten* v. *Kentucky*, 407 U.S. 104 (1972). There the petitioner had argued with a police officer and had refused to return to his car and move on when ordered to do so. He was convicted under a disorderly conduct statute that specifically and clearly made illegal such acts by its own terms. Because the statute itself defined as criminal the activities engaged in by the petitioner, this Court held that it was not void for vagueness.

[10] In *Gooding*, the evidence showed the use of insulting and threatening words that could have been prohibited by a statute that was narrowly drawn or construed as reaching "fighting words." Since the statute was not so limited, the defendant could raise its vagueness and overbreadth. Here, the evidence does not show that the words were insulting or threatening, but only that petitioner Steven Wright was attempting to give his side of the dispute.

tion to the words of the statute so as to make it clear that it encompasses his acts.[11] Just as in *Gooding*, the few decisions of the Virginia court interpreting the disorderly conduct statute made " 'no meaningful attempt . . . to limit or properly define [its] terms.' " 405 U.S. at 524. In *Taylor* v. *Commonwealth*, 187 Va. 214, 46 S.E.2d 384 (1948), the Virginia Supreme Court in interpreting that part of the disorderly conduct statute dealing with creating a disturbance on a public conveyance merely held that the refusal of a black passenger to obey a bus driver's order to move to the back of the bus did not constitute a violation of the statute. The only other case interpreting the statute, *Hackney* v. *Commonwealth*, 186 Va. 888, 45 S.E.2d 241 (1947), if anything, *broadened* its scope by holding that a person violated its provisions outlawing disorderly behavior on a public highway by shouting loud and abusive remarks from his front porch. The decision did not attempt to precisely define what kind of words constituted disorderly conduct, and certainly did not narrowly restrict the statute's reach to "fighting words."

Indeed this Court has already indicated that a statute that purports to outlaw arguing with a policeman as "disorderly conduct" is impermissibly broad and vague. *Thompson* v. *Louisville*, 362 U.S. 199, 206 (1960), citing *Lanzetta* v. *New Jersey*, *supra*. Thus, the vice of the Virginia disorderly conduct statute is precisely that condemned in cases such as *Ashton* v. *Kentucky*, *supra;* that is, the term "behave in a disorderly manner" is so open-ended and so undefined as to allow police officers to enforce it at a whim against activities that may come within the protection of the Fourteenth Amendment. Here, of

[11] *Compare*, *Bachellar* v. *Maryland*, 397 U.S. 564 (1970), where the state courts had, prior to the prosecution at issue, interpreted a broadly worded disorderly conduct statute to include the refusal to obey a policeman's order to move on when to disobey might endanger the public peace.

course, petitioner was engaged in the exercise of freedom of speech and petition in attempting to present his side of a dispute to an officer of the law. Again, whether his conduct might properly be punished under a narrowly drawn statute is not at issue. It is enough under the decisions of this Court that the statute "subjects the exercise of the right [of speech and petition] to an unascertainable standard." *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971). By imposing such discretion upon a police officer to place under arrest a person engaged in activities which are related to protected freedoms allows him on the spot to make decisions that can arbitrarily and unconstitutionally interfere with those liberties. See *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965).

2. In the alternative, if, as in *Thompson* v. *Louisville*, *supra*, it is assumed that "merely 'arguing' with a policeman is not, because it could not be, 'disorderly conduct' as a matter of the substantive law of [Virginia]," then the conviction of Steven Wright also cannot stand. *Thompson*, of course, held that a conviction based on no evidence showing the commission of a crime as defined by state law violates the due process clause. To the extent the disorderly conduct statute has been defined at all, it reaches abusive and vile speech. See *Hackney* v. *Commonwealth*, *supra*. Since no evidence was introduced below as to what petitioner Wright said, there is not even any basis for a conviction under the dubious rule of that case. See also, *Shuttlesworth* v. *Birmingham*, *supra*.

3. Finally, since the conviction of Steven Wright must be reversed on the ground that there was no basis for his initial arrest by the officer, then the other convictions should be remanded to the Virginia courts. It is well established in Virginia law that an illegal arrest may be

resisted by reasonable means (*Muscoe* v. *Commonwealth*, 86 Va. 443, 448-9, 108 S.E. 534 (1890); *Banks* v. *Bradley*, 192 Va. 598, 603, 66 S.E.2d 526 (1951)), not only by the person arrested but by persons in close relationship of affinity or consanguinity. *Mitchell* v. *Commonwealth*, 140 Va. 572, 580-1, 125 S.E. 311 (1924); *United States* v. *Moore*, 332 F. Supp. 919 (E.D. Va. 1971).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Order of the Circuit Court of the County of Albemarle Dated June 21, 1972

Court: Now I'm referring to case number 2419 which is the charge of disorderly conduct against Stephen Wise Wright. Now in response to the motion to strike, the court does take into account the information that was contained in the case Mr. Tucker has cited. The Court is familiar with the Georgia case as far as cursing and abusing, words calculated to provoke the breach of the peace. But as you will recall in this case, there was no charge that this man cursed anyone which constituted the disorderly conduct or that he used insulting words. His conduct was such in a public place in which there were 30 or more people apparently milling around outside according to the testimony of the officers when they arrived in three separate police cars. Then the Chief Investigating Officer at that time was undertaking to make his investigation and his testimony and that of at least one other officer was that Stephen Wright when he was asked not to interfere did in fact step back the first time and—after being asked by the officer. He interrupted the second time by—not only by his loud voice but the gestures and position in which he placed himself the second and third times. Now I don't find that his conduct consisted of—his disorderly conduct was based on cursing because the officer said—he said in effect that he cursed but that evidence is not substantially before the court in the language that would constitute cursing. The conduct that is before the court is what he actually did by the loudness of his voice and the manner in which he placed himself as far as the relative position of the

Order of the Circuit Court of the County of Albemarle Dated June 21, 1972

officer and the owner or the person who apparently was in charge of the establishment and who had made a complaint to the officer. At least when the officer arrived he went to the man that he, himself, knew to be connected with the operation of the establishment which is a public dance hall or public place of recreation and amusement. Finding himself in that position it seems to me that the conduct that the defendant Stephen Wise Wright engaged in was disorderly. The motion to strike the evidence on that charge is overruled. Likewise the charge against Stephen Wise Wright which is resisting arrest in violation of Section 18.1-310 of the Code seems to have been made out. It leaves the officer in a position where he's either got to assert his authority physically or use the power of arrest. Now I realize from what Mr. Tucker says that a man does not commit a crime by words, by mere words alone, they must be coupled with something else. When an officer is investigating a disturbance at a public place and then reacts to this situation the way he did, it seems to me that he was reasonable in undertaking to place Mr. Wright under arrest rather than knocking him aside because the alternative would be to have his investigation interferred with. I don't know exactly where that would lead officers in positions of investigating a disturbance at a public place, if he had to put up with this. You're getting awfully close to self-help when you deny any officer the opportunity to arrest on the combination of conduct and words which under other circumstances would be less threatening to public order. Therefore the motion as to Stephen Wise Wright on the resisting arrest is overruled. Mr. Tucker if you want to do—review all of these, you may make your exceptions at the conclusion

of all these, if you'd like to. Now on the case of Clarence Edward Wright, I don't find the evidence that would justify finding Clarence Edward Wright guilty of disorderly conduct at the time his brother, Stephen Wise Wright, was arrested. If his conduct was disorderly it would be merged in the offense of committing assault and battery on a police officer. To that extent the evidence seems to be insufficient to maintain the charge against Clarence Edward Wright Jr., as to the charge of disorderly conduct in a public place which is warrant—or case number 2416. The motion is sustained as to that charge against Clarence Edward Wright Jr. Now I don't think there can be any argument over the fact that Clarence Edward Wright Jr. jumped on Officer Guthrie from behind, and he was pulled off by another officer and subdued by force and I recognize of course that he may not have been fully aware at that particular moment that he himself was being placed under arrest. But, even so, he was fully aware that he was assaulting a police officer in uniform and the indications are that these other officers were standing by. On that basis that—the fact that he may have been slow to realize that he, himself, was under arrest would seem to be no excuse and the motion to strike as to the two cases 2417 and 2445, that is resisting arrest 2445, and committing an assault on an officer with his hands and fist 2417, both motions are overruled. Now Mr. Tucker I assume you wish to note exceptions—and objections to all those . . .

Tucker: I am not sure that such is necessary right now under the statute but I do note exceptions to the rulings insofar as the court has denied the motion to strike and would like to make clear another ground—I think it has

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been argued but I want to—and that is if the disorderly conduct statute is construed to embrace the conduct as has been shown here in the evidence, then purely the disorderly conduct statute is too vague to withstand the requirements of specificity of the due process called for in the 14th Amendment of the Constitution of the United States. A statute is required to be drawn so that a person can know from the statute what is proscribed and I submit that the statute here, Section 18.1-253.2 has nothing in it that puts a person on notice that his protestaion or even what's been described as stepping forward and stepping back is a violation of law. I think the statute does not give warning that this kind of conduct is prohibited so I just submit that as an additional due process ground in addition to the 1st Amendment position which we previously argued.

Court: Yes sir, I understand that—noted that in your argument before, the statute must be specific in what it undertakes to regulate. Mr. Tucker I suppose we are all limited in our ability to draw statutes which would have clear meaning to everyone. It seems to be an increasingly difficult art these days. On the other hand if we followed this argument to the extent that you have proposed, it leaves a police officer in a position where he has got to try a case before he decides to arrest . . .

Tucker: Isn't that a matter sir for the legislature to correct and not the courts?

Court: I don't think the legislature can go but so far in the use of language which in the past has had a clear meaning but in view of decisions which have gradually narrowed and confined in the application of certain words, we've even gotten to the point now where nobody knows

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what a curse word is anymore according to the Supreme Court. Now if you take that to the logical conclusion the court would say when using four letter words which are now the art in the theater and certain entertainment circles, wouldn't justify making arrests so the outraged person is left to his own protection and if he chooses to push the teeth of the other person who is using the words down his throat, that's his only recourse and this leaves the whole thing to be decided at almost the self help level which the police officer is designed to protect the public from having to result to. In other words if the police officer had no grounds for doing what he did, Mr. Kessler, the owner of the establishment would be left to his own devices. What you're saying in effect is that the officer shouldn't have arrested anybody—he should have gone on and left the place in an uproar. We can't hold the officers to a standard which actually goes to the point of defining words pass the point of being understandable to the general public and the word "disorderly" in my opinion carries enough of the common usage and knowledge with it that an officer has got to act on some basis on his own descretion. If you say that this man had no right to place the defendant under arrest, therefore the defendant having not been arrested, was not resisting arrest doesn't leave any meaning in the law at all. If the Supreme Court wants to indicate that and put the General Assembly back to redefining what public disorder is, resisting arrest and everything else combined, I suppose they will just have to do it. I don't think we can abandon that at this stage of the trial court but I realize that there have been in roads made on it. The motions are denied on the grounds indicated and an officer seems to me, whether his conviction

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would have stood up or not, does not appear that he acted outside any unlawful means himself in making this arrest and the defendants in undertaking to resist him, far exceeded what their conduct should have been as far as what was disclosed by the evidence the Commonwealth has presented.

Order of the Supreme Court of Virginia Dated February 2, 1973, Denying Petitions for Writs of Error

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of February, 1973.

The petition of Clarence Edward Wright, Jr., and Steven Wise Wright for writs of error and supersedeas to judgments rendered by the Circuit Court of Albemarle County on the 22nd day of June, 1972, in prosecutions by the Commonwealth against the said petitioners (Indictment Nos. 2414, 2416, 2417, and 2419), having been maturely considered and transcripts of the records of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas in each of these cases, the effect of which is to affirm the judgments of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

Order of the Supreme Court of Virginia Dated March 8, 1973, Denying Petition for Rehearing

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of March, 1973.

(Indictment Nos. 2414, 2416, 2417 and 2419)
Record No. R-14525

CLARENCE EDWARD WRIGHT, JR., AND
STEVEN WISE WRIGHT,

Plaintiffs in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

UPON A PETITION TO REHEAR

On mature consideration of the petition of the plaintiffs in error to set aside the judgment rendered herein on the 2nd day of February, 1973, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

H. Turner, Clerk

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In The

Supreme Court of the United States

October Term, 1972

No. 72-1632

STEVEN WISE WRIGHT AND
CLARENCE EDWARD WRIGHT, JR.,
Petitioners,

v.

VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendants Steven Wise Wright and Clarence Edward Wright, Jr., and Commonwealth.

QUESTIONS PRESENTED

The questions presented are set out in the brief of the defendants.

STATEMENT OF THE CASE

Defendants' statement of the case and statement of facts is substantially correct and is hereby adopted. In addition thereto, the Commonwealth directs the Court's attention to the testimony of Deputy Sheriff Guthrie appearing at pages 3-5 of the transcript of defendants' trial, particularly with reference to said witness's description of the actions of the defendant Steven Wright, inasmuch as it is this description of said actions that shows the conduct of Steven Wright which was the basis for his conviction of disorderly conduct.

LAW AND ARGUMENT

1. Was The Conviction Of The Defendants Constitutionally Invalid On The Basis That It Was Obtained Pursuant To An Unconstitutional Statute Or On The Basis That There Was A Total Lack Of Evidence Of Violation Of That Statute?

The defendants rely upon a number of decisions of this Court holding various state criminal statutes unconstitutional as being either vague or overbroad. The Commonwealth submits that this reliance is misplaced in that said decisions are clearly distinguishable both factually and legally from the instant case. All of those decisions involve statutes or ordinances which had the potential of unconstitutionally abridging freedom of speech so as to cut off the opportunity for public debate, protest, and discussion, and the convictions were of a general nature thereby raising the possibility that the convictions were for a proper exercise of the defendant's freedom of speech.

For instance, *Ashton* v. *Kentucky*, 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 1407 (1966) is distinguishable because it involved a criminal libel statute which included the language "any writing calculated to create disturbances of the peace," and because the trial court instructed the

jury on the terms of the statute without limitation, thereby allowing the possibility that the conviction was based on unconstitutional grounds. It involved the possibility of a conviction for breach of the peace where the offense was imprecisely defined and involved an intrusion on the defendant's First Amendment rights. By the same token, *Gooding* v. *Wilson,* 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972) involved a statute which punished only spoken words, thereby bringing about an obvious incursion on First Amendment rights, unless the state courts had supplied a requisite construction narrowly and precisely defining the prohibitions of the statute so as not to violate freedom of speech, and in *Gooding* the state courts had not provided such construction.

However, this Court has recognized that when the state courts have provided such a construction of a state statute, that construction will be binding on the United States Supreme Court. *Gooding* v. *Wilson, supra; Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942).

Contrary to the assertion of the defendants, the Commonwealth submits that the courts of this state have in fact defined what is meant by the provision in § 18.1-253.2 of the Code of Virginia (1950), as amended, prohibiting persons to behave in a "riotous or disorderly manner" in any public place. In *Hackney* v. *Commonwealth,* 186 Va. 888, 45 S.E.2d 241 (1947), the Virginia Supreme Court cites the "usual definition" of disorderly conduct as "all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts." The Virginia Supreme Court further stated that "the dominant purpose of its enactment was to preserve peace and good order"; and a person violates the statute if "his conduct is such as tends to

corrupt public morals or to outrage the sense of decency of others . . . who may be within sight or hearing of the perpetrator." See also *Parker* v. *McCoy*, 212 Va. 808, 812, 188 S.E.2d 222 (1972). In *Taylor* v. *Commonwealth*, 187 Va. 214, 46 S.E.2d 384 (1948), the Virginia Supreme Court, while not specifically defining disorderly conduct, did refer generally to the types of activity that the defendant in *Taylor* did not participate in so as to overturn her conviction for disorderly conduct. Those types of activity which the Court stated would be disorderly conduct were as follows: "She had not disturbed any person or persons, or caused any commotion affecting, in any degree, the peace and good order of the bus. Neither her words nor her acts has a vicious or injurious tendency, offensive to good morals or public decency . . . . She was guilty of no definite misbehavior or misconduct in the sense that she was disorderly or turbulent."

In no way does a prohibition on that type of activity bring about a broad incursion on freedom of speech such as was the case with the statutes in *Gooding* and *Ashton* referred to above. Furthermore, the conduct of the defendant Steven Wright could by no stretch of the imagination be construed as conduct intending to exercise some asserted freedom of speech. While the defendant Steven Wright may have used spoken words as well as conduct in his attempts to interfere with Deputy Sheriff Guthrie, his speech was simply speech designed to argue and overcome the speech of Deputy Sheriff Guthrie and Mr. Kessler, the owner of the establishment. It was not the speech or the words of the defendant Steven Wright which were important in his conviction of disorderly conduct, but it was the manner in which he attempted to insert his speech and the manner in which he used physical conduct to overcome a discussion between two other persons and to disrupt the

normal duties of a law enforcement officer. The trial court went to great lengths to specify in detail the basis for his finding and conviction of disorderly conduct, and the findings of the trial court were quite consistent with the definition of disorderly conduct previously given by the Virginia Supreme Court. This again was in no sense a general verdict under a broad reaching statute and in no sense left open for doubt the grounds or basis for the conviction, as was the case in *Ashton, supra*, and *Cantwell* v. *Connecticut*, 310 U.S. 296, 84 L.Ed. 1213 (1940) relied upon by the defendants in their brief.

This Court has held that it is constitutionally permissible to rest a conviction for disorderly conduct on a finding that the defendant refused to obey police commands to stop obstructing the sidewalk so as to block traffic along it. *Bachellar* v. *Maryland*, 397 U.S. 564, 25 L.Ed.2d 570, 90 S.Ct. 1312 (1970). The facts of the instant case are very similar to the facts in *Colten* v. *Kentucky*, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), and just as in *Colten*, the defendant in the instant case at the time of his arrest was not undertaking to exercise any constitutionally protected freedom. Rather, he appeared to have had no purpose other than to cause inconvenience and annoyance and disturbance to the Deputy Sheriff in question. Therefore, the statute as applied to the defendant herein did not chill or stifle the exercise of any constitutional right.

The Commonwealth also submits that the defendants' reliance on *Thompson* v. *Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960) is misplaced. In *Thompson*, the conviction of a man who had been found guilty of loitering and disorderly conduct was reversed on the grounds that his conviction was totally lacking in evidentiary support. The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the

weight or sufficiency of the evidence in any particular case. It goes rather to the question of whether a defendant's conviction rests upon any evidence at all. The only evidence in *Thompson* was that the defendant was "argumentative" with the arresting officer as to why he was being arrested. As can be seen from reading the testimony of Deputy Sheriff Guthrie, as well as from reading the opinion of the trial court, the defendant Steven Wright in the instant case certainly was more than simply argumentative with the arresting officer, and certainly there was enough evidence on which to rest the conviction so as to at the most bring about a question of sufficiency of the evidence and not a question of the total lack of any evidence at all.

2. Were The Convictions Of Steven Wrigth For Resisting Arrest And Clarence Wright For Assault And Battery And Resisting Arrest Also Invalid On The Grounds That All Of Their Actions Occurred Solely Because Of An Illegal Arrest Of Steven Wright?

The Commonwealth submits that the arrest of Steven Wright under the circumstances was proper and valid and therefore, the actions of Steven Wright and Clarence Wright in order to resist and prevent that arrest were clearly unlawful, and those convictions are valid and proper. The proposition set forth by the defendants in their brief in citing *Banks* v. *Bradley,* 192 Va. 598, 66 S.E.2d 526 (1951) has no applicability where the arrest was proper since they refer only to the extent of the right to resist an unlawful arrest. Even for the sake of argument, if the arrest of Steven Wright was illegal, the actions of Clarence Wright in jumping upon the back of one of the arresting officers and physically attacking him was certainly not justified, and therefore, his conviction for assault and battery was proper under any circumstances.

CONCLUSION

For the foregoing reasons, the Commonwealth submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW P. MILLER
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 10th day of September, 1973, I mailed three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Samuel W. Tucker, Esquire, Hill, Tucker & Marsh, 214 East Clay Street, Richmond, Virginia 23219, counsel for petitioners.

GILBERT W. HAITH
Assistant Attorney General